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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1462

REX CHAINBELT, INC.,

Petitioner,

vs.

HARCO PRODUCTS, INC., dba DFC COMPANY,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari.

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Respondent, Harco Products, Inc., files this Brief pursuant to Supreme Court Rule 24.

The opinion of the Court of Appeals has now been reported at 512 F.2d 993.

The Decision of the Court of Appeals Is in Accord With the Applicable Decisions of This Court.

The facts relevant to the Petition for Certiorari appear in Findings No. 31 through 47, set forth in Appendix A to the petition. Briefly, these facts are that United States Letters Patent No. 2,970,783, which Petitioner (Rex) alleged in its complaint to be infringed, is a combination patent, and relates to the combination in a rock crusher of the metal wearing parts and the backing portion therefor wherein the backing portion is epoxy resin.

Epoxy resin was invented in the 1930's, and since the early 1950's it has been manufactured and sold by many chemical producers and used for a wide variety of purposes. It is sold by Rex under the name "Nordbak". Respondent Harco sells epoxy resin under the name "Rockfill". Harco has never sold crushers.

Rex never had a patent on "Nordbak" or epoxy resin, Pre-Trial Conference Order, Paragraph 49 [CR 1015]. Wearing parts of rock crushers such as the bowl liners or mantles are made of steel. The steel wearing parts are mounted on the crusher body by a backing material of epoxy resin. The steel wearing parts become worn down through use, and must be replaced at periodic intervals. This is done by removal of the remainder of the wearing parts, an incident of which is the removal of the backing material. New steel wearing parts are installed on the crusher using epoxy resin, Pre-Trial Conference Order, Paragraphs 6-9 [CR 1007-1008].

Rex sells its "Nordbak" epoxy resin to crusher users for use in the practice of the alleged invention of Patent No. 2,970,783 without a specified royalty charge. The "Nordbak" can labels [CR 27-28] and the "Nordbak" brochure [CR 29-34] explicitly tell the purchaser how the contents of the cans are to be used, that is, as backing material for wear members in crushers in accordance with the patent-in-suit. The patent-in-suit is identified by number on one of the can labels.

Rex has, since the issuance of the patent in 1961, brought an infringement action against every known supplier of epoxy resin to crusher users for use as backing material, Pre-Trial Conference Order, Paragraph 48 [CR 1015]. Infringement suits were brought against

Smith Engineering Works, Division of Barber-Greene, Inc., Allis-Chalmers, Esco Corporation, and Frog, Switch Mfg. Co., and resulted either in a settlement and a license, or the competitors stopping competitive sales.

Prior to bringing the present suit, Respondent Harco asked for a license from Rex [RT 292-293]. This request was met by Rex's filing the present action, alleging that Harco's sale of replacement epoxy resin to crusher operators infringes its patent.

The courts below struck down Rex's can label licenses and patent litigation practices as being a tying arrangement and unlawful under Section 1 of the Sherman Act, 15 USC 1.

Tying arrangements involving patents have been held to be unlawful ever since *Leeds and Catlin Co. v. Victor Talking Machine Co.*, 213 U.S. 325, 53 L.Ed. 816 (1909) and *Henry v. A. B. Dick Co.*, 224 U.S. 1, 56 L.Ed. 645 (1912) were overruled by this Court in *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 61 L.Ed. 871 (1917). Patent-based tie-ins have been consistently found unlawful, *Carbice Corporation of America v. American Patent Development Corporation*, 283 U.S. 27, 75 L.Ed. 819 (1931); *Leitch v. Barber*, 302 U.S. 458, 82 L.Ed. 371 (1938); *B. B. Chemical v. Ellis*, 314 U.S. 495, 86 L.Ed. 367 (1942); *The Mercoid Cases*, 320 U.S. 661, 88 L.Ed. 376 (1944); and *International Salt Co. v. United States*, 332 U.S. 392, 93 L.Ed. 20 (1947). Patent tie-ins were found to be violative of the antitrust laws in *The Mercoid Cases, supra*, and *International Salt Co., supra*. This Court has indicated continuing adherence to the rule of law enunciated in these cases in *Northern Pacific v. United States*, 356 U.S. 1, 2 L.Ed.2d 11

(1962), and *Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U.S. 495, 22 L.Ed.2d 495 (1969). While the underlying rationale of the patent tie-in cases has been sharply questioned recently by Professor Bowman in "Patent and Antitrust Law," University of Chicago Press (1973), particularly at pages 140 *et seq.*, Petitioner does not appear to challenge the rationale of this line of cases.* Rather Petitioner attempts to distinguish them. As the Court of Appeals below demonstrates in footnote 3a of its opinion, this line of cases cannot be distinguished from the case at bar.

Petitioner sells the completed patented combination, viz, the crusher including the steel wearing parts and epoxy backing as new or original equipment. Petitioner separately sells its "Nordbak" brand epoxy as an after market item for use in backing of replacement wearing parts in previously-sold crushers. Obviously, the new equipment sales of crushers do not dispel the effects of Rex's tie-ins which effect the after-market only. A new crusher is a major purchase and has a useful life of many years. The epoxy resin must be replaced at frequent intervals as the steel wearing parts become worn out. The can label licenses and patent litigation of Rex have the effect of controlling or eliminating competition in the sale of epoxy resin in the after-market. It is not economically sensible to say that the owner of an expensive crusher wishing to replace the wearing parts and epoxy resin has the alternative of buying a new crusher. This is the alternative which Rex has presented to the trade and which it urges to be lawful in its petition. The absurdity of Rex's position can be easily seen by reference to a more familiar but analogous situation. During the life of an automobile, it is periodically necessary to replace the tires. If the manufacturer of the automobile controlled the sale of replacement tires through a tie-in, it would be no defense to a charge of antitrust violation for the manufacturer to say that the owner of the automobile had the alternative of buying a new automobile. The result would be no different even if the complete automobile were patented.

Thus, it is apparent that Rex has used its patent to control the sales of replacement epoxy resin to crusher users. The economic effect of such control has been the exclusion of sellers of replacement epoxy resin and the concomitant lessening of competition in commerce involving such epoxy resin. The unpatented epoxy resin has been brought under Rex's control in the guise of the exercise of its purported patent rights. The policy underlying the tie-in cases decided by this Court since 1917 has been that any use of a combination patent to control or lessen competition in the sale of unpatented parts or components of the combination is unlawful.

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*In any event, the drastic upheaval urged by Professor Bowman would cause havoc with existing business enterprises and arrangements. The Bowman proposals, if adopted, would result in a devastation of the replacement parts industries, with these businesses being displaced by the original equipment manufacturers who would become the source of such components. Even if such a result were desirable as a matter of economic policy, it seems unwise for this Court to undertake such far-reaching changes without the guidance of Congress. Furthermore, Professor Bowman's proposals involve a new balancing of interests between the original manufacturers of patented machines and the suppliers of replacement parts. If a new balance is to be struck, it should be done only after thorough study of all of the relevant factors involved, none of which are illuminated in the present record.

Conclusion.

The decision of the Court of Appeals below is consistent with, indeed, compelled by the long line of tie-in cases decided by this Court.

Respectfully submitted,

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